Supreme Court of the United States

OCTOBER TERM—1943.

ADOLF AXELRATH,

Petitioner,

against

SPENCER KELLOGG AND SONS, INC.,

Respondent.

PETITIONER'S BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI

Opinions Below

The opinion of the Special Term (R. 73) has not been officially reported but has been unofficially reported at 33 N. Y. Supp. (2d) 94. No opinion for affirmance was rendered by the majority of the Appellate Division. The dissenting memorandum of Mr. Justice (now Presiding Justice) Close (R. 81) is reported at 265 App. Div. 874. No opinion was handed down by the Court of Appeals on affirmance but a report of its decision appears at 290 N. Y. memo. 223.

Jurisdiction

Jurisdiction of this Court is invoked upon the ground that the question presented involves a right, privilege and immunity set up and claimed by the respondent under a

Statute of the United States, to wit: Section 9 of the Shipping Act of 1916, as amended by the Act of June 23, 1938 (Title 46, U. S. C. Section 808, 52 Stat. 964). This Court's authority to grant the writs prayed for by the foregoing petition is found in Section 237(b) of the Judicial Code (Act of February 13, 1935, c. 229, Section 1, 43 Stat. 937). A discussion of the substantial nature of the question involved appears above in the petition under the heading "Jurisdiction" (p. 7) to which there is no occasion to add anything at this point. See also the discussion, *supra,* under the heading: "Reasons relied on for the allowance of the writ" (pp. 12-16).

Statement of the Case

A statement of the case is contained in the petition for certiorari *supra* (p. 2) under the heading "Summary and Short Statement of the Matter Involved" which will not be here repeated.

Specification of Errors

As pointed out in the petition for certiorari (*supra,* p. 10) it is not the practice in the State of New York to assign errors upon the taking of an appeal, inasmuch as the notice of appeal brings up for review the entire judgment or order appealed from unless the notice of appeal itself specifically limits its scope to a part of the judgment or order appealed from, which is not the situation in the case at Bar (R. 2-4, 78).

We have in the petition for certiorari specified the questions presented for review to this Court (*supra,* p. 11). The Court of Appeals specifically committed error as follows:

1. In failing to hold that a contract to sell a vessel by an American citizen to an alien which prior to the

expiration of the time for performance was assigned to a citizen of the United States, was a valid and binding contract so that upon tender of performance by the assignee and refusal to deliver by respondent, respondent was in default by reason of which it excused and rendered unnecessary the performance by petitioner's assignor of the conditions of the brokerage agreement requiring approval of the Maritime Commission transfer of title and full payment to be made to the respondent.

2. In failing to hold that the tender of performance by Moore-McCormack Lines, Inc., was a valid tender of performance of the contract of sale and that upon such tender and refusal by respondent, petitioner's assignor had earned his commissions as broker.

3. In affirming the judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered in the office of the Clerk of Nassau County on December 9, 1942 (R. 80), and the order of said Appellate Division entered November 23, 1942 (R. 79) which in turn affirmed the judgment of the Supreme Court of the State of New York entered in the office of the Clerk of the County of Nassau on April 9, 1942 (R. 5) and the order of the Special Term of the Supreme Court of the State of New York entered in the office of the Clerk of the County of Nassau on March 20, 1942 (R. 6) dismissing plaintiff's complaint and the order of the Special Term of the Supreme Court of the State of New York entered in the office of the Clerk of the County of Nassau on February 14, 1942 (R. 8) denying plaintiff's motion for summary judgment and for the relief demanded in the complaint.

4. In failing to reverse the above mentioned judgment and order of the said Appellate Division and the judgment and orders of the Supreme Court and to grant plaintiff's motion for summary judgment for the relief demanded in the complaint.

Summary of Argument

The contract of sale between respondent and Lloyd Brasileiro was a valid and binding agreement from the time of its execution notwithstanding the absence of approval by the Maritime Commission. The contract, by its express terms assignable, was validly assigned by Lloyd Brasileiro to Moore-McCormack Lines, Inc., prior to the expiration of the time for performance under the terms of the contract. The tender of performance by Moore-McCormack Lines, Inc. prior to the expiration of the time for performance was valid and placed respondent in default when respondent refused to accept such tender and to make delivery of the vessel. Upon such default, petitioner's assignor was excused from the conditions of the brokerage agreement requiring transfer of title and full payment to be made for the vessel before payment of the brokerage commission. The condition of the brokerage agreement requiring the approval of the Maritime Commission was excused by the assignment of the contract to a purchaser, Moore-McCormack Lines, Inc., prior to the law date to whom such condition had no application. Plaintiff having performed all of the conditions of the brokerage agreement except such as were excused by the assignment to Moore-McCormack Lines, Inc., and by respondent's default he has earned his brokerage commissions and was entitled to judgment for the relief demanded in the complaint.

Argument

In approaching the discussion of the issue of law, it might be well to point out that certain basic principles of brokerage law of the State of New York, applicable to this case, are established beyond dispute and are not in controversy here. This case can be decided only by the determination of the Federal questions involved which

have been delineated in the petition for certiorari (*supra*, p. 11), since the determination of the Federal questions will automatically decide which of the indisputable principles of state law are to apply to the facts involved.

First, petitioner readily concedes that it is an elementary principle of law that before a broker is entitled to commissions claimed to have been earned under an agreement to pay them, it is necessary that all of the conditions precedent of the agreement, imposed upon the broker at the time of his employment, be performed.

Hall v. *Shiff*, 179 App. Div. 699;
Fuller v. *Bradley Constr. Co.*, 229 N. Y. 605;
Williams v. *Ashner*, 152 App. Div. 447.

Second, however, it is an equally basic principle that although a broker is bound by any condition imposed upon the payment of his commissions at the time of his employment, he is relieved of those conditions where nonperformance results from the principal's default.

Stern v. *Gepo Realty Corp.*, 289 N. Y. 274;
Goodman v. *Marcol, Inc.*, 261 N. Y. 188;
Amies v. *Wesnofske*, 255 N. Y. 156, 163;
Colvin v. *Post Mortgage and Land Co.*, 255 N. Y. 510, 517;
Tanenbaum v. *Boehm*, 202 N. Y. 293;
Davidson v. *Stocky*, 202 N. Y. 423;
Sibbald v. *Bethlehem Iron Co.*, 83 N. Y. 378.

In the *Sibbald* case which is a leading authority and persistently cited in the reports, the court stated, pages 383-4:

> "If the efforts of the broker are rendered a failure by the fault of the employer; if capriciously he changes his mind after the purchaser, ready and willing, and consenting to the prescribed terms, is produced; or if the latter declines to complete the con-

tract because of some defect of title in the ownership of the seller, some unremoved incumbrance, some defect which is the fault of the latter, then the broker does not lose his commissions."

To determine which of the foregoing principles applies to the facts at Bar, we are relegated to the decision of the Federal question involved whether there was or was not a valid contract of sale by respondent to Lloyd Brasileiro, which was validly assigned to Moore-McCormack Lines, Inc., notwithstanding the absence of approval by the Maritime Commission.

The Shipping Act requires the approval of the Maritime Commission to the sale by a citizen of the United States of any vessel "to any person not a citizen of the United States" or to the "transfer or (placing) under foreign registry or flag" of any such vessel (Title 46 U. S. C. A., Sec. 808; 52 Stat. 964). No approval is required for the sale or transfer of a vessel by one citizen of the United States to another; nor is any approval required for the transfer of a vessel by an alien to an American citizen.

Respondent was desirous of selling a vessel. Lloyd Braileiro was anxious to purchase it. The identity of the particular purchaser was of no interest to respondent since the contract was by its terms assignable. But so long as the prospective purchaser was an alien—a foreign government—the consent of the Maritime Commission was a necessary incident in the completion of the transaction.

It seems to be evident that obtaining the approval of the Maritime Commission was not the purpose of the parties in contracting. The primary purpose was the sale and purchase of a vessel. The Commission's approval was a mere incident—an inevitable obstacle, to the extent and only to the extent that the law required such approval. Upon the assignment of the contract to a citizen the need

for approval vanished by express provision of the statute; and since the time for performance provided in the contract had not expired, respondent's obligation to carry out its bargain could not be satisfied by the plea that the non-essential approval was not forthcoming. From the time of the assignment, the Maritime Commission had no statutory authority to approve the sale to an American citizen. Performance of the condition then became impossible within the meaning of Section 301 of the Restatement of Contracts, which provides:

> "Impossibility that would discharge the duty to perform a promise excuses a condition if
>
> (a) a debt for performance rendered has already arisen and the condition relates only to the time when the debt is to be discharged, or
>
> (b) existence or occurrence of the condition is no material part of the exchange for the promisor's performance and the discharge of the promisor will operate as a forfeiture."

The performance of the condition was no material part of the consideration for the sale of the vessel. If anything it was a burden upon and a source of expense to the respondent. Respondent contracted to sell its vessel for the sum of $400,000, and that sum was tendered to it by the assignee of the purchaser, in cash or in any other form that respondent would prefer. Whatever motive induced respondent's change of mind to sell the "Spencer Kellogg" it certainly was not the absence of a purchaser ready, willing and able to buy on respondent's own terms. The Court will not find it difficult to surmise the motive if the scarcity of tankers which developed between October and December of 1940 is borne in mind.

With the general principle of law relied on by the Courts below, that parties cannot make a valid contract to do an act prohibited by statute (R. 75) we do not of

course disagree. The principle however has no application to the facts at Bar. The parties here did not agree to do anything proscribed by law. They expressly agreed to observe the law. Contracts to do acts requiring governmental consent are as valid as any other type of agreement, if no purpose to evade the statutory proscription is evident.

Professor Williston says (6 Williston on Contracts, Revised Edition, 5019, note 3):

> "The fact that a party bargains to do an act which will be illegal unless governmental permission is obtained does not make such bargain illegal, and if he does not obtain such permission he is responsible in damages for failure to perform."

This would seem to be the doctrine of the New York Court of Appeals in respect of State license regulations.

> *Zwirn* v. *Galento,* 288 N. Y. 428;
> *Raner* v. *Goldberg,* 244 N. Y. 438;
> *Shedlinsky* v. *Budweiser Brewing Co.,* 163 N. Y. 437.

The principle has not, however, been applied by that Court to the Federal statute here involved.

As stated in the petition for certiorari (*supra,* p. 12), we have been able to find only one Federal report, The Pilot, 42 Fed. (2d) 290, in which the principle involved in this case was considered and the decision of that case supports petitioner's contentions. The Court there expressly held that there was no violation of the Shipping Act notwithstanding that the agreement for sale was not expressly conditioned upon approval by the then Shipping Board, where the vessel was not actually delivered and did not leave American waters prior to obtaining the approval of the Board. The Court specifically stated at page 290:

> "I think the claimant clearly had an opportunity to get the Board's permission before the boat left American waters."

In the case at Bar, the burden of obtaining such permission or approval of the Maritime Commission was expressly placed on the respondent by the specific terms of the contract. Respondent was to exercise all diligence to obtain such approval—not approval by December 6, 1940, the date of the Commission's decision, but approval "on or before the date of delivery" (R. 19). Such approval was to be evidenced by a certified copy of the Commission's order to be delivered at the time of delivery of the vessel on December 16th, 1940 (R. 17). The respondent had already received a payment of $100,000 on account of the purchase price of the vessel. Is it to be assumed that such payment was intended to be a mere token of esteem and that the obligation of respondent was illusory and non-existent because it could, by its own refusal to act cause non-performance of the contract? Rehearing might have been applied for; a new application could have been filed. (Title 46 U. S. C. A., Section 824, 39 Stat. 736.) We do not contend that these steps should have been taken. They are pointed out to demonstrate that the Commission's action, ten days prior to the expiration of the time for delivery, was not the irrevocable death sentence of the contract under which respondent had undertaken to exert its best efforts to obtain approval "on or before the date of delivery". So long as the possibility of performance existed the contract could not be terminated by the unilateral action of the respondent. In our present political economy when governmental restraint and control so greatly pervade the sphere of business and commercial transactions, it is establishing a precedent of far reaching and dangerous consequences to hold that a party solemnly assuming an obligation to obtain governmental consent to the performance of an ordinary commercial contract can evade responsibility by

his own inaction and refusal to use the "all diligence" expressly undertaken (R. 19). So long as there remained a period of time before the final date for delivery during which efforts might have been made to obtain permission of the Maritime Commission, respondent's obligation to perform continued.

It may be profitable to consider the hypothetical case which would have existed if the Maritime Commission had approved the contract upon rehearing on December 7, 1940, the day after it denied approval.

To accept the position of the Courts below would be to hold that in such case the approval of the sale on rehearing would have been ineffectual to bind respondent to make delivery of the vessel notwithstanding that approval had been obtained before the time for performance specified in the contract had expired and that it was respondent's obligation to exercise "all diligence" to obtain such approval. The argument, followed to its logical conclusion, implies a limitation upon the statutory authority of the Maritime Commission to reconsider its orders and to amend, reverse or modify them. (Title 46 U. S. C., Section 824, 39 Stat. 736.)

The parties in contracting did not provide that the approval must needs be granted upon the specific form of application which was filed. On the contrary, they provided that the defendant was to exercise "all diligence" to obtain approval (R. 19). The parties did not provide that the contract was to terminate if the Maritime Commission preliminarily failed to approve the sale but changed its ruling later. They did not provide that approval was to be obtained on any specified date but that the defendant was to obtain the approval "on or before the date of delivery of the vessel" (R. 19) which was December 16, 1940. The contract did not provide that the seller's obligation to exercise "all diligence" to obtain the approval should terminate on December 6,

1940; it provided no limitation upon the seller's obligation to obtain such approval.

It is submitted that the contract between defendant and Lloyd Brasiliero was a valid and binding agreement; that the condition of obtaining approval of the Maritime Commission to the sale was in no sense a condition precedent to the existence of the contract; that it was at most an obligation of respondent which was performable at any time up to and including the date for delivery of the vessel and performance of which became unnecessary after its *raison d'etre* came to an end upon the assignment of the contract to Moore-McCormack Lines, Inc.

It must be remembered that this is not a case where respondent could not deliver because of some defect in its title or other obstacle rendering performance by it impossible. The purchaser, Moore-McCormack Lines, Inc., was actually ready, willing, able and anxious to take delivery of the vessel within the time for performance specified in the contract and actually tendered full payment of the contract price in cash. Respondent had the actual opportunity of completing the sale and receiving full payment under its contract. If respondent had not wilfully refused to perform its agreement of sale, every condition of the commission letter of September 3, 1940 would have been satisfied. The sale would have been effected, approval of the Maritime Commission was no longer necessary, full payment would have been made and title would have been transferred to Moore-McCormack Lines, Inc. If ever a broker had fully earned his commission and accomplished the job he was hired to do, plaintiff's assignor did so in this case. Respondent, however, having refused to perform for whatever reasons personal to itself it might have had, now attempts to shield itself behind the provisions of the Shipping Act and takes a position which we submit is both legally unsound and from a business viewpoint completely irresponsible; a position that can only be justified if this Court holds that under the provisions of the Shipping Act and similar statutes requir-

ing governmental consent, businessmen cannot make valid contracts to obtain such governmental consent. We submit there is no policy of public expedience requiring that such a construction be placed upon the Act. The purpose of the Act is to protect the public interest against transactions which might be detrimental. It was never intended to stultify commerce or to prevent businessmen from engaging in ordinary commercial transactions subject to the approval of Federal commissions where necessary. It seems to us that in a case such as the one at bar where the approval of a Federal commission has become unnecessary within the time fixed for performance by the contract, the contract must be performed by the contracting parties; and upon failure to perform they are not privileged to invoke the immunity given by the statute to protect the public interest against a wholly different transaction and situation.

Conclusion

It is respectfully submitted that the Court of Appeals by its judgments sought to be here reviewed has determined a Federal question of substance and of general importance which has not heretofore been decided by this Court or by any Appellate Federal Court. To the extent that it has been at all considered by a Federal District Court its determination was contrary to the determination of the Court of Appeals. The determination of the Federal question and only the determination of the Federal question will decide the issues between the parties litigant in this action. It is, therefore, respectfully prayed that the petition for writs of certiorari submitted herewith be granted so that this Court may review the judgments of the Court of Appeals of the State of New York in said petition referred to.

Respectfully submitted,

Sydney J. Schwartz and
Howard F. R. Mulligan,
Counsel for Petitioner.